

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Nicholas Crooks
Candace Crooks

NOTICE OF HEARING AND
MOTION FOR RELIEF FROM
AUTOMATIC STAY

Debtors

Chapter 7, Case No. 04-34474

TO: Nicholas Crooks and Candace Crooks, INCLUDING TRUSTEE AND OTHER
INTERESTED PARTIES

1. Mortgage Electronic Registration Systems, Inc., (“Movant”), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 10:30 am on September 7, 2004, in Courtroom 228B, 316 North Robert Street, St. Paul, MN 55101 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on September 1, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than August 26, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays).

UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on August 2, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtors, subject to a mortgage to Movant.

6. Debtors above-named are the owners of certain real property located at 2419 Johnny Ridge Road, Faribault, MN 55021, legally described as follows, to-wit:

Lot 9, in Block 6, in Birn-Hill First Addition, Faribault, Rice County, Minnesota.

7. The indebtedness of Nicholas Crooks and Candace Crooks is evidenced by a Promissory Note and Mortgage dated May 14, 2001, filed of record in the Rice County Recorder's office on May 29, 2001, and recorded as Document No. 478197. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. The Debtors have failed to pay monthly mortgage payments since April 1, 2004, and are in default in the amount of \$7,118.93 together with reasonable attorneys fees and costs incurred pursuant to the note and mortgage. Debtors have failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is approximately \$112,000.00.

10. The Debtors have executed a second mortgage in favor of Home Town Federal Credit Union on April 28, 2003, which mortgage was filed of record on May 6, 2003, as Document No. 516402 in the original amount of \$28,870.00. Upon information and belief, the principal balance of said mortgage is still in that amount.

11. The Debtors have estimated the value of the homestead as \$150,000.00, and accordingly, Debtors have limited equity in the premises and, presuming typical selling costs, have no equity in the property and therefore cause exists to find lack of adequate protection.

12. The undersigned attorneys have commenced foreclosure proceedings, which proceeding was terminated as a result of the filing of the bankruptcy petition on August 2, 2004.

13. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: August 19, 2004

USSET & WEINGARDEN P.L.L.P

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(952) 925-6888

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

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Candace Crooks

MEMORANDUM OF LAW

Debtors

Chapter 7, Case No. 04-34474

Mortgage Electronic Registration Systems, Inc. ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

FACTS

Movant holds a valid, duly perfected mortgage on real property owned by the Debtors. On the date this case was filed, the Debtors were delinquent in respect of payments due under the note and mortgage. Since this case was filed Debtors have made no payments to Movant and as of this date the total debt is in the amount of approximately \$112,000.00 and including the amount due the second mortgage holder, the approximate total amount encumbering the property is \$140,870.00. The Rice County Assessor estimates the property value at \$150,000.00.

ARGUMENT

Under Section 362(d)(1), the Court shall grant relief from the automatic stay upon a creditors request "for cause, including the lack of adequate protection of an interest in property." Under Section 362(d)(2) relief shall be granted "if the debtor has no equity in the property and the property is not necessary for an effective reorganization".

Under the "equity cushion" theory, a creditor is adequately protected if the Debtors have equity in the property sufficient to shield the creditor from either the declining value of the collateral or an increase in the claim from accrual of interest or expenses. Equitable Life Assurance Society vs. James River Assocs. (In re James River Assoc.), 156 B.R. 494 (E.D. Va. 1993). The amount of equity cushion sufficient to adequately protect a creditor is made on a case-by-case basis. Kost vs. First Interstate Bank (In re Kost), 102 B.R. 829, 831 (D. Wyo. 1989). In Kost, the court observed the following:

Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection. . . . Case law has almost uniformly held that an equity cushion under 11% is insufficient to constitute adequate protection. . . . Case law is divided on whether a cushion of 12% to 20% constitutes adequate protection.

Id. at 831-32 (citations omitted).

Here, the equity cushion is less than 6 percent. This slight equity cushion, coupled with other factors, shows that Movant is not adequately protected. Debtors have failed to make any payments on the loan for 5 months and interest continues to accrue. Moreover, even if the Debtors succeed in selling the property for a price near the estimated value, the equity will be depleted after payment of the sale and closing costs. Accordingly, Movant is not adequately protected. See In re Kerns, 111 B.R. 777, 789-90 (S.D. Ind. 1990); Bargas vs. Rice (In re Rice), 82 B.R. 623, 627 (Bankr. S.D. Ga. 1987); First Agricultural Bank vs. Jug End in the Berkshires, Inc. (In re Jug End in the Berkshires, Inc.), 46 B.R. 892, 899 (Bankr. D. Mass. 1985); In re Kertennis, 40 B.R. 895, 899 (Bankr. D.R.I. 1984).

Since Movant is not adequately protected, it is entitled to relief from the automatic stay pursuant to §362(d)(1). As there is no true equity here, and the property in a Chapter 7 is not necessary for a reorganization, relief is also appropriate under §362(d)(2).

Accordingly, Movant is entitled to an Order terminating the stay and authorizing it to foreclose its mortgage on the property.

Dated: August 19, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo
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Minneapolis, MN 55416
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U.S. BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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Debtors

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-34474

Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on August 19, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Nauni Jo Manty
Chapter 7 Trustee
333 S. 7th Street, #2000
Minneapolis, MN 55402

Lance R. Heisler
Attorney at Law
PO Box 740
Northfield, MN 55057

Nicholas Crooks
Candace Crooks
2419 Johnny Ridge Road
Faribault, MN 55021

/E/ Erin Kay Buss
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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ORDER

Debtors.

Chapter 7, Case No. 04-34474

The above entitled matter came on for hearing upon motion of Mortgage Electronic Registration Systems, Inc., ("Movant"), pursuant to 11 U.S.C. Section 362 on September 7, 2004, at the U.S. Bankruptcy Court, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Lot 9, in Block 6, in Birn-Hill First Addition, Faribault, Rice County, Minnesota.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this __ day of _____, 2004.

Judge of the Bankruptcy Court